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## Raman a/l Kunjiraman v Public Prosecutor

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FEDERAL COURT (PUTRAJAYA) — CRIMINAL APPEAL NO 05–260–10 OF 2011
ARIFIN ZAKARIA CHIEF JUSTICE, HASHIM YUSOFF, SURIYADI, ZALEHA ZAHARI AND SULONG MATJERAIE FCJJ
9 JANUARY 2013

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*Criminal Law — Dangerous drugs — Statutory presumption — Appellant found guilty for trafficking in dangerous drugs under s 39B(1)(a) and (2) of the Dangerous Drugs Act 1952 — Whether trial judge had erred in his approach in handling of presumptions under s 37(da) and 37(d) — Whether learned judge had invoked both presumptions — Whether learned trial judge breached rule against double presumption — Whether trial judge erred when ruled that there was prima facie case of trafficking based on s 37(d) — Whether learned trial judge failed to rule whether appellant had rebutted presumptions under s 37(da) and 37(d) — Dangerous Drugs Act 1952 s 37(d), 37(da), 39B(1)(a) & (2)*

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*Evidence — Adverse inference — Accused remaining silent at trial — Appellant found guilty for trafficking in dangerous drugs under s 39B(1)(a) and (2) of the Dangerous Drugs Act 1952 — Trial judge criticised appellant for remaining silent in his cautioned statement — Whether adverse inference drawn by trial judge — Whether appellant's silence entitled trial judge to give appropriate weight to appellant's defence*

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The appellant was charged for trafficking in dangerous drugs under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act') punishable under s 39B(2) of the Act. The learned trial judge found him guilty and consequently, he was sentenced to death. The appellant's appeal to the Court of Appeal was dismissed, hence the appellant filed the present appeal on two grounds. Firstly, the Court of Appeal failed to recognise that the learned trial judge had erred in his approach in the handling of the statutory presumption namely s 37(da) and 37(d) of the Act ('the first issue'). In respect of the first issue, the appellant submitted that: (a) the learned trial judge had invoked both presumptions under s 37(da) and 37(d) of the Act; (b) in his approach, the learned trial judge could have breached the rule against double presumption; (c) the learned trial judge erred when he ruled that there was a prima facie case of trafficking based on s 37(d) of the Act; and (d) the learned trial judge failed to rule whether the appellant had rebutted the presumptions under s 37(da) and 37(d) of the Act. Secondly, the learned trial judge erred in law when he criticised the appellant for remaining silent in his cautioned statement ('the second issue'). This

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ground of appeal related to the learned trial judge's criticism of the appellant for not disclosing the role of the lady 'Noi' in his cautioned statement. Further, the appellant submitted that it was trite law that an accused person charged under the Act could elect to remain silent in his cautioned statement.

**Held**, dismissing the appeal and affirming the decision and sentence:

(1) The learned trial judge had not breached the rule of double presumptions by taking into consideration the various alternatives in the reservoir of choices or alternatives available to him to determine the culpability of the appellant. The learned judge was considering those alternatives when he considered whether to invoke the presumption under s 37(d) or alternatively under s 37(da) of the Act. There was nothing in the ground of judgment to show that the learned trial judge fell into error by invoking both s 37(d) and 37(da) of the Act (see paras 30–31).

(2) There was overwhelming evidence to prove that the appellant was indeed in possession of the drugs. The court agreed with the learned trial judge that: the custody and control had been established as the drugs were found on the appellant's lap; and the appellant also had mens rea possession. It could be seen that the unequivocal positive finding of possession was made independent of the statutory presumption under s 37(d) of the Act. The totality of the evidence reasonably supported the conclusion made that the appellant was in actual possession of the prescribed drugs at the time of his arrest in the car (see paras 32–33).

(3) Based on the grounds of judgment, it was obvious that the learned trial judge did not rule that there was a prima facie case of trafficking based on s 37(d) of the Act as alleged (see paras 34–37).

(4) In view of the overwhelming nature of the evidence adduced against the appellant, and that his defence was of mere denial, and applying the ratio in *Andy bin Bagindah v Public Prosecutor* [2000] 3 MLJ 644, the circumstances of the instant case did not warrant the learned trial judge to undertake a separate exercise to rule whether the appellant had rebutted s 37(da) and 37(d) presumptions (see para 47).

(5) No adverse inference may be drawn against the appellant for remaining silent upon his arrest. The appellant did not have any duty to disclose his defence and entitled to remain silent after his arrest and when his cautioned statement was recorded. Similarly, no adverse inference was to be drawn against the appellant for remaining silent for not disclosing his defence. However, his silence would entitle the learned trial judge to give whatever weight considered appropriate (see para 52).

(6) By commenting on the failure of the appellant to provide all relevant information regarding 'Noi' to the police at the time of his arrest or when his cautioned statement was recorded four days after his arrest did not

mean that the learned trial judge had imposed a duty on the appellant to speak or disclose any information on 'Noi'. The court did not perceive from the grounds of judgment of the learned trial judge that he had drawn any adverse inference against the appellant. His comments on the non-disclosure of 'Noi's' role merely went to show to the weight that was attached to the appellant's defence (see para 54).

**[Bahasa Malaysia summary**

Perayu dituduh mengedar dadah berbahaya di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952 ('Akta') yang boleh dihukum di bawah s 39B(2) Akta. Hakim bicara mendapati perayu bersalah dan akibatnya, dia dijatuhi hukuman mati. Rayuan perayu ke Mahkamah Rayuan telah ditolak, oleh itu perayu memfailkan rayuan semasa atas dua alasan. Pertama, Mahkamah Rayuan gagal mengakui bahawa hakim bicara yang bijaksana telah salah dalam pendekatannya dalam mengendalikan anggapan statutori iaitu s 37(da) dan 37(d) Akta ('isu pertama'). Berhubung dengan isu pertama, perayu berhujah bahawa: (a) hakim bicara yang bijaksana telah menggunakan kedua-dua anggapan di bawah s 37(da) dan 37(d) Akta; (b) dalam pendekatannya, hakim bicara yang bijaksana melanggar peraturan terhadap anggapan berganda; (c) hakim bicara yang bijaksana terkhilaf apabila memutuskan terdapat kes prima facie pengedaran berdasarkan s 37(d) Akta; dan (d) hakim bicara yang bijaksana gagal untuk memutuskan sama ada perayu telah menyangkal anggapan di bawah s 37(da) dan 37(d) Akta. Kedua, hakim bicara yang bijaksana terkhilaf dari segi undang-undang apabila beliau mengkritik perayu kerana telah berdiam diri dalam pernyataan beramarannya ('isu kedua'). Alasan rayuan ini berkaitan dengan kritikan hakim bicara yang bijaksana terhadap perayu kerana tidak mendedahkan peranan wanita bernama 'Noi' dalam pernyataan beramarannya. Selanjutnya, perayu berhujah bahawa ia adalah undang-undang yang mantap bahawa seseorang tertuduh yang dituduh di bawah Akta boleh memilih untuk berdiam diri dalam pernyataan beramarannya.

**Diputuskan**, menolak rayuan dan mengekalkan keputusan dan hukuman:

(1) Hakim bicara yang bijaksana tidak melanggar peraturan terhadap anggapan berganda dengan mempertimbangkan beberapa alternatif atau alternatif yang tersedia kepadanya untuk menentukan kebersalahan perayu. Hakim yang bijaksana mempertimbangkan pilihan-pilihan tersebut apabila beliau mempertimbangkan sama ada untuk mengguna pakai anggapan di bawah s 37(d) atau secara alternatif di bawah s 37(da) Akta. Tiada apa-apa pun di dalam penghakiman yang menunjukkan bahawa hakim bicara yang bijaksana terkhilaf dengan menggunakan kedua-dua s 37(d) dan 37(da) Akta (lihat perenggan 30–31).

(2) Terdapat keterangan yang kukuh untuk membuktikan bahawa perayu sebenarnya mempunyai milikan ke atas dadah tersebut. Mahkamah

A bersetuju dengan hakim bicara yang bijaksana bahawa: jagaan dan kawalan telah dibuktikan kerana dadah tersebut ditemui di pangkuan perayu; dan perayu juga mempunyai milikan mens rea. Ia dapat dilihat bahawa dapatan positif yang tidak berbelah bagi mengenai milikan telah dibuat berkecuali daripada anggapan statutori di bawah s 37(d) Akta. Keseluruhan keterangan tersebut dengan wajar menyokong kesimpulan yang dibuat bahawa perayu mempunyai milikan sebenar ke atas dadah tersebut pada masa penangkapannya di dalam kereta (lihat perenggan 32–33).

C (3) Berdasarkan alasan penghakiman, adalah jelas bahawa hakim bicara yang bijaksana tidak memutuskan bahawa terdapat kes prima facie bagi kes pengedaran dadah berdasarkan s 37(d) Akta seperti yang didakwa (lihat perenggan 34-37).

D (4) Memandangkan sifat keterangan yang dikemukakan terhadap perayu adalah kukuh, dan pembelaannya adalah penafian semata-mata, dan dengan mengaplikasikan ratio dalam kes *Andy bin Bagindah v Public Prosecutor* [2000] 3 MLJ 644, keadaan kes semasa tidak mewajarkan hakim bicara yang bijaksana untuk melaksanakan suatu langkah yang E berasingan untuk memutuskan sama ada perayu telah menyangkal anggapan-anggapan s 37(da) dan 37(d) (lihat perenggan 47).

(5) Tiada anggapan bertentangan boleh dibuat terhadap perayu kerana berdiam diri apabila ditangkap. Perayu tidak mempunyai tanggungjawab F untuk mendedahkan pembelaannya dan berhak untuk berdiam diri selepas penangkapannya dan apabila pernyataan beramarannya direkodkan. Begitu juga, tiada anggapan bertentangan boleh dibuat terhadap perayu kerana berdiam diri untuk tidak mendedahkan pembelaannya. Walau bagaimanapun, tindakannya mendiamkan diri G akan memberi hak kepada hakim bicara yang bijaksana untuk memberi apa-apa pemberatan yang dianggap sesuai (lihat perenggan 52).

(6) Dengan mengulas mengenai kegagalan perayu untuk memberikan semua maklumat yang relevan mengenai 'Noi' kepada polis semasa H penangkapannya atau apabila pernyataan beramarannya direkodkan empat hari selepas penangkapannya tidak bererti bahawa hakim bicara yang bijaksana telah meletakkan tanggungjawab ke atas perayu untuk bercakap atau mendedahkan apa-apa maklumat mengenai 'Noi'. Berdasarkan alasan penghakiman hakim bicara yang bijaksana, I mahkamah tidak merasakan bahawa beliau telah membuat anggapan bertentangan terhadap perayu. Komen-komennya mengenai kegagalan mendedahkan peranan 'Noi' hanya menunjukkan pemberatan yang diberikan kepada pembelaan perayu (lihat perenggan 54).]

**Notes**

For a case on accused remaining silent at trial, see 7(1) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 374.

For cases on statutory presumption, see 4(1) *Mallal's Digest* (5th Ed, 2018 Reissue) paras 881–885.

**Cases referred to**

*Alcontara a/l Ambross Anthony v PP* [1996] 1 MLJ 209; [1996] 1 CLJ 705, FC (refd)

*Andy bin Bagindah v PP* [2000] 3 MLJ 644; [2000] 3 CLJ 289, CA (folld)

*Mohd Hazrin bin Md Sari v PP* [2008] 3 MLJ 798; [2008] 5 CLJ 361, CA (refd)

*Muhammed bin Hassan v PP* [1998] 2 MLJ 273; [1998] 2 CLJ 170, FC (folld)

*Ong Ah Chuan v PP; Koh Chai Cheng v PP* [1981] 1 MLJ 64, PC (refd)

*PP v Abdul Rahman bin Akif* [2007] 5 MLJ 1; [2007] 4 CLJ 337, FC (refd)

*PP v Badrulsham bin Baharom* [1988] 2 MLJ 585 (refd)

*PP v Tan Gong Wai & Anor* [1985] 1 MLJ 355 (refd)

*Parlan bin Dadeh v PP* [2008] 6 MLJ 19, FC (refd)

*Teng Boon How v Pendakwa Raya* [1993] 3 MLJ 553, SC (refd)

*Teng Howe Sing v PP* [2009] 3 MLJ 46; [2009] 3 CLJ 733, FC (refd)

**Legislation referred to**

Dangerous Drugs Act 1952 ss 37(d), 37(da), 39B(1)(a), 39B(2)

*Hisham Teh Poh Teik (Teh Poh Teik & Co) for the appellant.*

*Mangairkarasi a/p Krishnan (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.*

**Sulong Matjeraie FCJ (delivering judgment of the court):**

INTRODUCTION

**[1]** The appellant was charged for trafficking in 265.61g of drugs comprising 70.2g of heroin and 195.41g of monoacetylmorphine in front of Hotel Desa Jaya, Jalan Permatang 5, Taman Desa Jaya, Ulu Tiram in the district of Johor Bahru in the State of Johor Darul Ta'zim on 2 May 2002 at 4.30pm an offence under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('Act') punishable under s 39B(2) of the Act.

**[2]** At the end of the defence case the appellant failed to raise any reasonable doubt in the prosecution's case and was found guilty as charged by the learned High Court judge and sentenced to death. His ensuing appeal to the Court of Appeal was dismissed hence this appeal to the Federal Court of Malaysia.

A RELEVANT FACTS OF THE PROSECUTION'S CASE

**[3]** The facts of the prosecution's case relevant to this appeal are as follows. Upon receiving information of a drug trafficking activity, PW5, Chief Inspector Arsad bin Kamaruddin, conducted a briefing pertaining to the said matter to some ten police personnel at Ibu Pejabat Polis Kontingen, Johor.

**[4]** After the briefing, PW5 led the police party to Hotel Desa Jaya, Jalan Pematang 5, Taman Desa Jaya, Ulu Tiram, Johor Bahru ('the scene'). On arrival they saw a car bearing registration number JGK9479 ('the car') parked on the side of the road in front of Hotel Desa Jaya. The appellant was seen sitting alone inside the car.

**[5]** The police party then closed in by obstructing the car at both ends with their vehicles. Whilst the front part of the car was blocked by a van carrying the first group of police personnel, the rear of the car was blocked by the second group of police officers in their 'Kancil car'.

**[6]** PW6, Corporal Mohamad bin Suleiman and Lance Corporal Mohd Azmi proceeded to the right front door of the car while PW5 went to the left side of the front door. PW5 identified himself to the appellant by showing to the appellant his authority card.

**[7]** The car attempted to flee from the scene by reversing but was impeded as it crashed into the police car which was blocking it at the rear end. It was also the prosecution's case that the appellant attempted to flee by opening the driver's door but was prevented from so doing by PW6.

**[8]** PW5 entered the car from the front passenger door and switched off the car engine and forthwith seized the ignition key.

**[9]** On the lap of the appellant, PW5 found a white plastic bag (P9). This testimony was confirmed by PW6.

**[10]** Inside P9 was a paper box containing five translucent plastic packets containing yellowish granular and powdery substance, which, upon analysis by the government chemist, PW9, Abdullah bin Mohd Yusof, confirmed that the substance contained 70.2g of heroin and 195.41g of monoacetylmorphine the subject matter of this charge. Learned counsel for the appellant did not even cross-examine let alone challenge the testimony of PW9.

**[11]** With regard to the car, PW3, Ng Kim Meng and PW4, Ng Zeng Sheng testified that the appellant rented it from their hire car company, Sykt Daite Transport, at about 1.15pm on 2 May 2002, the day of the incident.

THE CASE FOR THE DEFENCE

**[12]** At the end of the prosecution's case, the learned High Court judge found that the prosecution had established a prima facie case against the appellant and called upon the appellant to enter his defence.

**[13]** The appellant elected to give evidence on oath and was the sole witness for the defence. In his defence, the appellant adduced, inter alia, the following.

(a) he was 43 years old and a car re-possessor and he did not own any car but as and when the need arose he would either borrow his brother-in-law's motorcycle or rent a car to move around;

(b) he had a lady friend known as 'Noi' whom he met at a bar in Bandar Permas Jaya. 'Noi' stayed at Taman Desa Jaya, Ulu Tiram, Johor, while her boyfriend 'Yusof' stayed at Bandar Kota Masai, Johor;

(c) about a week before his arrest, he rented a car from a car-hire company, Syarikat Daite Transport, Johor Bahru. The rented car had brake problem and as such on 2 May 2002 he took it back to the car-hire company;

(d) at about 12.30 afternoon on 2 May 2002 on his way to the car-hire company, 'Noi' called the appellant to ask for a lift to send her home. The appellant obliged but with a condition that she agree to accompany him to Sykt Daite Transport. Upon her agreement he fetched her from Holiday Plaza, Century Gardens, Johor Bahru. On entering the car, the appellant saw 'Noi' carrying a white plastic bag;

(e) the appellant reached Sykt Daite Transport at 1pm and met up with PW3 to exchange the car. He was given the keys to the car and invited 'Noi' to join in. 'Noi' entered the car and placed the white plastic bag she was carrying at the foot-well of the front passenger seat. Both of them proceeded to an Indian Muslim restaurant at Taman Johor Jaya for lunch;

(f) while having lunch between 3.30 and 3.45pm, 'Noi' received a phone call from 'Yusof' asking her to go to a hotel at Taman Desa Jaya to meet some friends. The appellant agreed to send 'Noi' there and upon reaching the hotel he parked the car in front of the hotel. 'Noi' again requested the appellant to wait for her while she went in to collect some money from 'Yusof'. The appellant waited in the car with the engine still running;

(g) at that time the appellant saw a van blocking the car at the front and a Kancil car at the rear. He saw ten men surrounding the car;

(h) fearing for his safety he reversed the car and bumped into a Kancil car that was blocking it from the rear;

(i) the appellant saw PW5, who was in plain clothes, alighting from the van and approaching the front passenger's door of the car. PW5 opened the door and entered the car and removed the ignition key and then identified himself as a police officer. There were other men who opened the door of the car and attacked him. They pulled him out of the car;

(j) PW5 recovered the white plastic bag from the foot-well of the front passenger's seat. The appellant explained that the white plastic bag belonged to a friend named 'Noi' who had just gone up to the hotel; and

(k) the appellant denied that the white plastic bag was seized from his lap or had any knowledge of its contents or that it belonged to him. He was handcuffed and driven to the police station in the car.

**[14]** It is pertinent to observe here that there was no mention of the names of 'Noi' or 'Yusof' in the appellant's statement to the police. The appellant did not even know the real name of 'Noi' except that he knows that 'Noi' works at 'Café Two'. The appellant neither knew the full name of 'Yusof' nor his full address.

## FINDINGS OF THE HIGH COURT

**[15]** At p 82 appeal record, the learned High Court judge said:

> The prosecution story was challenged. But yet there was no doubt that the white plastic bag containing the proscribed drug was indeed found on the lap of the accused. Both PW5 and PW6 affirmed that the white plastic bag was found on the lap of the accused. And both PW5 and PW6 were firm and unshaken on that critical fact. There was no reason to disbelieve them. The fact that the white plastic bag containing the proscribed drug was on the lap of the accused meant that the accused had actual physical possession of that white plastic bag. Also, the accused must have actual knowledge that in his possession was the white plastic bag, for that white plastic bag, it being on his lap, was right under his nose and before his eyes. The accused must also have felt the weight (it was more than 2 kilograms) of the white plastic bag and its content on his lap. Without doubt, the accused had actual physical possession of that white plastic bag and knowledge of that possession.
>
> Now whether the accused had knowledge of the contents of the white plastic bag must necessarily be inferred (for a detailed discussion on the proof of knowledge by drawing inferences, see *Public Prosecutor v Reza Mohd Shah bin Ahmad Shah* [2002] 4 MLJ 13 from the facts and circumstances (see *Public Prosecutor v Abdul Rahman Akif* [2007] 4 CLJ 337, where it was held by the Federal Court per Arifin Zakaria FCJ, as he then was, that the fact that the contents were hidden from view, while relevant in determining whether the requisite knowledge was absent, should

still not be given too much weight, and that the finding of knowledge, or the rebuttal of it, is an inference to be drawn from all the facts and circumstances, giving due weight to the credibility of the witnesses). A

In *Warner v Metropolitan Police Commissioner* [1968] 2 All ER 356, where the House of Lords was asked to answer if a defendant is deemed to be in possession of a prohibited substance when to his knowledge he is in physical possession of the substance but is unaware of its true nature, Lord Reid held that it would be pedantic to hold that it must be shown that the accused knew precisely which drugs he held in his possession. And in *Ramis a/l Muniandy v Public Prosecutor* [2001] 3 SLR 534, it was held by the Singapore Court of Appeal that physical control in the absence of any reasonable explanation was sufficient to lead to a strong inference of knowledge. B C

In the instant case, the conduct of the accused was wholly inconsistent with absence of knowledge of the drugs. The accused was a car re-possessor. It was suggested that the accused, by reason of his occupation, was afraid of certain members of the public. But it was unchallenged evidence that PW5 had identified himself to the accused. The accused should know that it was the police at the scene, and there was no reason to run. Yet it would seem that the accused was intent on getting away. The evidence was that the accused attempted to drive away, and when that failed the accused attempted to flee on foot. Given the facts and circumstances, the accused must have had knowledge of the contents of the bag. It was the finding that the accused had possession of those proscribed drugs with all requisite knowledge. D E

*There was no direct evidence of a trafficking activity*. But section 37(da)(iiia) of Dangerous Drugs Act 1952 (Act) provided that any person who is found in possession of 'a total of 15 grammes or more in weight of heroin, morphine and monoacetylmorphine or a total of 15 grammes or more in weight of any two of the said dangerous drugs', otherwise in accordance with the authority of this act or any other written law, shall be presumed, until the contrary is proved, to be trafficking in the said drugs. *There was a prima facie case with the invocation of section 37(da)*. F

*Alternatively, the finding could be that the accused had custody or control, rather than actual physical possession, of the white plastic bag on his lap*. That would not change anything. Section 37(d) provided that 'any person who is found to have had in (his) custody or under his control anything whatsoever containing any dangerous drug shall, until the contrary is proved, be deemed to have been in possession of such drug and shall, until the contrary is proved, be deemed to have known the nature of such drug'. With a finding or (sic) custody or control, the accused shall be deemed to have been in possession of the drugs and shall, until the contrary is proved, be deemed to have known the nature of such drug. The invocation of section 37(d) precluded the invocation of section 37(da). But given that the drugs was more than 27 times the minimum weight that would trigger the presumption of trafficking, it would not seem that the drugs were intended for personal consumption (see *Ong Ah Chuan v PP*; *Koh Chai Cheng v PP* [1981] 1 MLJ 64, where it was held that the greater the amount of drugs, the greater the inference that it was not intended for personal consumption). It was the irresistible that the accused had it to traffick it. There was a prima facie case even without the invocation of section 37(da). G H I

On all permutations, custody or direct possession, there was a prima facie case. The evidence was sufficient to convict should the accused remain silent ...

(Note: Emphasis added to indicate the context within which the learned trial judge used those expressions which counsel for the appellant alleged to have invoked both statutory presumptions under s 37(da) and 37(d) Dangerous Drugs Act 1952).

**[16]** At p 87 of the appeal record, the learned trial judge continued:

> The defence of the accused was that the white plastic bag belonged to 'Noi' and that he did not know that it contained drugs. The defence relied on the existence of 'Noi' and her alleged role, to cast a doubt ...
>
> 'Noi' was critical to the defence. Reasonably, it must have dawned upon the accused that in order to extricate himself he must disclose 'Noi' and her alleged role, that is, if he had nothing criminally to do with the white plastic bag. The accused contended that he informed PW5 that Noi had deposited the bag and that 'Noi' was inside Hotel Desa Jaya. PW5 denied that he was so informed.

**[17]** At the last paragraph of p 88 of the appeal record, the learned trial judge questioned the assertion of ignorance by the appellant when he opined:

> There was one other aspect of the defence that did not sit well with the assertion of ignorance. The accused testified that PW5 found the white plastic bag in the foot-well, that PW5 did not open the white plastic bag, and that it was at that point that he informed PW5 that the white plastic bag belonged to 'Noi' (see 47NP). But if PW5 had not opened that bag, and if the accused did not know that it contained drugs, then what reason was there for the accused to distance himself from the white plastic bag when its contents were yet unbeknown to him? The accused was economical with the truth.

**[18]** The learned trial judge was left in no doubt of the guilt of the appellant when he ended his judgment in the penultimate paragraph of p 89 of the appeal record by saying:

> At the end of the entire case, there was no doubt that the white plastic bag and contents were on the lap of the accused, and there was no reasonable explanation for it. The accused had not cast any reasonable doubt. The prima facie case remained intact. Beyond all doubt, the accused was guilty as charged.

## FINDINGS OF THE COURT OF APPEAL

**[19]** In the ensuing appeal to the Court of Appeal, the appellate court could not agree with the arguments of learned counsel. The Court of Appeal found that 'the evidence against the appellant was overwhelming with the bagful of drugs on his lap, the appellant was driving alone and the evidence are as affirmative as the facts in the case of *Public Prosecutor v Abdul Rahman bin Akif* [2007] 5 MLJ 1; [2007] 4 CLJ 337. The appellant's reaction of attempting to flee was also affirmative evidence similar to the case of *Parlan bin Dadeh v Public Prosecutor* [2008] 6 MLJ 19'.

**[20]** The Court of Appeal found that there was no miscarriage of justice and dismissed the appeal. The conviction and sentence imposed by the learned High Court judge were therefore affirmed.

GROUNDS OF APPEAL TO THE FEDERAL COURT

**[21]** Not known for being a filibuster, counsel for the appellant, Mr Hisyam Teh Poh Teik only canvassed two main grounds why the conviction of the appellant for drug trafficking could not stand and they are as follows:

(a) that the Court of Appeal failed to recognise that the learned trial judge had erred in his approach in the handling of the statutory presumption namely s 37(da) and 37(d) of the Dangerous Drugs Act 1952; and

(b) that the learned trial judge erred in law when he criticised the appellant for remaining silent in his cautioned statement.

**[22]** We will deal with these two grounds in turn.

*That the Court of Appeal failed to recognise that the learned trial judge erred in his approach in the handling of the statutory presumptions namely s 37(da) and 37(d) of the Dangerous Drugs Act 1952*

**[23]** Learned counsel for the appellant approached the first ground by arguing on four main areas. First, it was canvassed that the learned trial judge had invoked both presumptions under s 37(da) and 37(d) of the Dangerous Drugs Act 1952. Secondly it was argued that in his approach the learned trial judge could have breached the rule against double presumption. Thirdly the learned trial judge erred when he ruled that there was a prima facie case of trafficking based on s 37(d) Dangerous Drugs Act 1952 and fourthly it was the contention of the appellant that the learned trial judge failed to rule whether the appellant had rebutted the presumptions under s 37(da) or 37(d) Dangerous Drugs Act 1952. We shall deal with the submissions in turn.

That the learned trial judge had invoked both the s 37(da) and 37(d) presumptions

**[24]** Learned counsel contended that from the evidence adduced there was no direct evidence of trafficking and quoted what the learned trial judge said at p 84 of the appeal record:

> There was no direct evidence of trafficking activity.

**[25]** As such, counsel submitted that to prove the offence of trafficking the presumption provision had to be alluded to. He submitted that the learned trial

judge had relied on both s 37(da) and 37(d) presumptions. This is reflected at p 85 of the appeal record where the court said:

> There was a prima facie case with the invocation of s 37(da).

**[26]** Further, counsel said the learned trial judge added:

> Alternatively, the finding could be that the accused has custody or control, rather than actual physical possession, of the white plastic bag on his lap ... invocation of section 37(d) precluded the invocation of section 37(da).

**[27]** We shall deal with all the issues raised in the first ground together. Learned counsel pummelled that the learned trial judge misdirected himself when on the facts, he invoked the s 37(da) presumption and in the alternative the s 37(d) presumption. He argued that this is because for the former to apply there must be an affirmative finding of possession whilst in the case of s 37(d), it is 'deemed possession'.

**[28]** The other complaint of counsel was that there was no direct evidence of trafficking and it was stated as much by the learned trial judge. However it could be seen that the learned trial judge qualified his earlier statement when he continued in the very next sentence at the last paragraph of p 84 of the appeal record by saying:

> But section 37(da)(iiia) of the Dangerous Drugs Act 1952 (Act) provided that any person who is found in possession of 'a total of 15 grammes or more in weight of heroin, morphine and monoacetylmorphine or a total of 15 grammes or more in weight of any two of the said dangerous drugs', otherwise than in accordance with authority of this act or any other written law, shall be presumed until the contrary is proved, to be trafficking in the said drug'. There was a prima facie case with the invocation of section 37(da).

**[29]** It was also contended that the learned trial judge misdirected himself when 'he invoked the 37(da) presumption and in the alternative the 37(d) presumption'.

**[30]** A careful reading of the judgment of the learned trial judge reveals that the learned judge was fully aware of the danger of breaching the rule of double presumption when he said in no uncertain term that 'the invocation of s 37(d) precluded the invocation of s 37(da)'. Furthermore, the ratio in *Muhammed bin Hassan v Public Prosecutor* [1998] 2 MLJ 273; [1998] 2 CLJ 170 in effect, only says that, one cannot rely on the presumption of possession under s 37(d) of the Act to invoke a further presumption of trafficking under s 37(da) of the Act. In other words, *Muhammed bin Hassan* only prohibits the use of double presumptions under s 37(d) and 37(da) of the Act. Contrary to the argument of the counsel, there is nothing to prevent the learned trial judge from analysing

all the alternatives available to him under the Act. The learned trial judge has not breached the rule of double presumptions by taking into consideration the various alternatives in the reservoir of choices or alternatives available to him to determine the culpability of the appellant. Judges may expatiate on the various alternatives available without the need to incur the obloquy of counsel.

**[31]** We observe that the learned judge was considering those alternatives when he considered whether to invoke the presumption under s 37(d) or alternatively under s 37(da) of the Act. There was nothing in the ground of judgment to show that the learned trial judge fell into error by invoking both s 37(d) and 37(da) as envisaged in *Muhammed bin Hassan*. We are satisfied that the application of legal principles to the facts of this case had sufficiently been appreciated, applied, and well ascertained by the learned trial judge.

**[32]** An important issue is whether the appellant was in possession of the drugs ie, was he in physical possession of the impugned drugs and knew what he was possessing. The learned trial judge had, at p 82 of the appeal record affirmatively found that the appellant was in possession of 70.2g of heroin and 195.45g of monoacetylmorphine. In our judgment there was overwhelming evidence to prove that the appellant was indeed in possession of the drugs. The learned trial judge said:

> ... there was no doubt that the white plastic bag containing the proscribed drug was indeed found on the lap of the accused. Both PW5 and PW6 affirmed that the white plastic bag was found on the lap of the accused. And both PW5 and PW6 were firm and unshaken on that critical fact. There was no reason to disbelieve them. The fact that the white plastic bag containing the proscribed drug was on the lap of the accused meant that the accused had actual physical possession of that white plastic bag. Also, the accused must have actual knowledge that in his possession was the white plastic bag, for that white plastic bag, it being on his lap, was right under his nose and before his eyes. The accused must also have felt the weight (it was more than 2 kilograms) of the white plastic bag and its content on his lap. Without doubt, the accused had actual physical possession of the white plastic bag and knowledge of that possession.

**[33]** We find no flaw in the above argument and agree with the finding that apart from being satisfied that the custody and control had been established as the drugs were found on his lap, he also had mens rea possession. It can be seen that the unequivocal positive finding of possession was made independent of the statutory presumption under s 37(d) of the Act. The totality of the evidence reasonably supports the conclusion made that the appellant was in actual possession of the prescribed drugs at the time of his arrest in the car.

**[34]** The third point raised by learned counsel on the first ground of appeal relates to the astonishing allegation that the learned trial judge erred when he ruled that there was prima facie case of trafficking based on s 37(d). We have

A sieved through the grounds of judgment but failed to find anywhere to substantiate such allegation. The exact words used by learned counsel in his written submission are reproduced below in toto:

> that the Learned Trial Judge erred when he ruled that there was a prima facie case of trafficking based on 37(d); ...

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**[35]** On the contrary, the learned trial judge at pp 84–85 of the appeal record said, inter alia:

> There was no direct evidence of a trafficking activity. But section 37(da)(iiia) of the
C Dangerous Drugs Act 1952 (Act) provided that any person who is found in possession of 'a total of 15 grammes or more in weight of heroin, morphine and monoacetylmorphine or a total of 15 grammes or more in weight of any two of the said dangerous drugs', otherwise than in accordance with the authority of this act or any other written law, shall be presumed, until the contrary is proved, to be
D trafficking in the said drug. *There was a prima facie case with the invocation of section 37(da).* (Emphasis added.)

**[36]** At pp 85–86 of the appeal record the learned trial judge said further:

> But given that the weight of drugs was more that 27 times the minimum weight that
E would trigger the presumption of trafficking, it would not seem that the drugs were intended for personal consumption (see *Ong Ah Chuan v Public Prosecutor; Koh Chai Cheng v Public Prosecutor* [1981] 1 MLJ 64, where it was held that the greater the amount of drugs, the greater the inference that it was not intended for personal consumption). It was the irresistible inference that the accused had it to traffick it. *There was a prima facie case even without the invocation of section 37(da).*
F
> On all permutations, custody or direct possession, there was a prima facie case. The evidence was sufficient to convict should the accused remain silent. The accused was ordered to enter upon his defence. (Emphasis added.)

G **[37]** It is obvious therefore that the learned trial judge did not rule that there was a prima facie case of trafficking based on s 37(d) as alleged. There is no merit in the appeal under the third heading of the first ground of appeal.

**[38]** Last but not least was the allegation that the learned trial judge erred
H when he failed to make a finding whether the defence had rebutted the presumptions under s 37(da) or 37(d) of the Act.

**[39]** It is clear from pp 84–86 of the appeal record that the learned trial judge had made a finding of actual mens rea possession and invoked the presumption
I of trafficking under s 37(da) of the Act in order to call upon the appellant to enter his defence. Alternatively, the learned trial judge held that a case of presumed possession could also be made out from the fact that the prescribed drugs were found on his lap, that is to say, in the physical custody and control of the appellant. In view of the large quantity of drugs, almost two kilograms,

were found on the appellant's lap and applying the principle in *Ong Ah Chuan v Public Prosecutor; Koh Chai Cheng v Public Prosecutor* [1981] 1 MLJ 64, a case of actual trafficking could be made out against the appellant.

**[40]** In *Ong Ah Chuan*, Lord Diplock at p 69 said:

> Generally, in the absence of an express admission by the accused, the purpose with which he did an act is a matter of inference from what he did. Thus, in the case of an accused caught in the act of conveying from one place to another controlled drugs in a quantity much larger than is likely to be needed for his own consumption the inference that he was transporting them for the purpose of trafficking in them would, *in the absence of any plausible explanation by him*, be irresistible — even if there were not statutory presumption such as is contained in section 15 of the Drugs Act.
>
> As a matter of common sense the larger the quantity of drugs involved the stronger the inference that they were not intended for the personal consumption of the person carrying them, and the more convincing the evidence needed to rebut it. (Emphasis added.)

**[41]** At p 89 of the appeal record, the learned trial judge held that:

> At the end of the entire case, there was no doubt that the white plastic bag and contents were on the lap of the accused, and there was no reasonable explanation for it. The accused had not cast any reasonable doubt. The prima facie case remained intact. Beyond all doubt, the accused was guilty as charged.

**[42]** We agree with the submission of the learned deputy public prosecutor that the plain reading of the above paragraph would suggest that the learned trial judge was of the view that the appellant's defence did not raise any reasonable doubt on the issue of possession thus leaving the prosecution's case intact.

**[43]** On the issue of presumed trafficking under s 37(da) of the Act, the Court of Appeal held at p 5 of supplementary appeal record that the sentence 'The prima facie case remained intact ...' carries the same meaning as the prosecution's case remained unrebutted'. The evidence against the appellant is overwhelming. With the bagful of drugs on his lap and that the appellant was driving alone, the evidence analogically are as affirmative as the facts in the case of *Public Prosecutor v Abdul Rahman bin Akif* [2007] 5 MLJ 1; [2007] 4 CLJ 337. The appellant's reaction of attempting to flee is also affirmative evidence, similar to the case of *Parlan bin Dadeh v Public Prosecutor* [2008] 6 MLJ 19. We do not find any plausible reason to disagree with what had been held by the Court of Appeal.

**[44]** A similar issue as to the trial judge's failure to consider, as a separate exercise, whether the presumption of trafficking under s 37(da) of the Act had

been rebutted was considered by the Court of Appeal in *Andy bin Bagindah v Public Prosecutor* [2000] 3 MLJ 644; [2000] 3 CLJ 289. Shaikh Daud Ismail JCA speaking for the court at p 646 (MLJ); p 291 (CLJ) said:

> Several grounds of appeal were put forward but the learned counsel for the appellant centred his argument on three grounds. Firstly, it is his contention that the learned judge failed to carry out a separate exercise under s 37(da) of the Act as required by the Supreme Court case of *Mohamad Radhi bin Yaakob v Public Prosecuto* [1991] 3 CLJ 2073. In the Supreme Court case, which is also a drug trafficking case, the court held that unless the evidence in a particular case does not obviously so warrant, it is incumbent upon the court to consider whether on a balance of probabilities defence has rebutted the statutory presumption of trafficking under s 37(da) of the Act as a separate exercise even though the court is satisfied on balance that the presumption of possession under s 37(d) of the Act had not been rebutted. On our perusal of the grounds of judgment of the learned judge, we found that he quoted *in extenso* the findings of the Supreme Court in *Mohamad Radhi*'s case and applied therein to the present case. Be that as it may, there is a distinction between that case and the present case. In the present case, the appellant's defence was a mere denial and nothing more. In *Mohamad Radhi*'s case the qualifying factor was that, 'unless the evidence in a particular case does not obviously so warrant ... '. The defence was not a mere denial but that he was in possession of the bag in which the offending drug was found but that he was an innocent and a momentary carrier and called several witnesses in support of that defence. The trial judge (there) simply brushed aside all these and held that since the accused had failed to rebut the presumption of possession under s 37(d) of the Act, the presumption under s (da) of the Act had also not been rebutted. As can be seen in the light of the defence therein, the trial judge failed to carry out a separate exercise to consider whether the defence had also rebutted the presumption of trafficking. In the present case, the appellant had denied possession and the learned judge found that after considering the whole evidence, including that of the appellant, he was satisfied that the prosecution had proved their case beyond a reasonable doubt and the appellant had failed to raise any doubt, we find no reason to disagree with the learned judge. Therefore, the circumstances in the present case did not warrant the learned judge to undertake a separate exercise.

**[45]** Likewise in the instant case, the appellant's defence is of mere denial. There is overwhelming evidence that the appellant had custody and control of the drugs and had mens rea possession of the drugs. The drugs were found on his lap. This fact was challenged by the defence whose version was that the white plastic bag was recovered from the foot-well of the front passenger's seat. However, PW5 and PW6 were consistent in their evidence when they testified that the white plastic bag was found on the lap of the appellant. The learned trial judge found that both PW5 and PW6 were firm and unshaken on that critical fact and that there was no reason to disbelieve them.

**[46]** The testimonies of PW5 and PW6 were further corroborated by P12, the search list which confirmed that the white plastic bag containing the drug

was recovered from the appellant's lap. In a gist there was consistency as to where the drugs were found. The appellant's cautioned statement D17 recorded four days after his arrest was silent on this issue. The learned trial judge was therefore entitled to believe the prosecution's version of where the drugs were recovered.

**[47]** In view of the overwhelming nature of the evidence adduced against the appellant, and that his defence was of mere denial, and applying the ratio in *Andy bin Bagindah*, the circumstances of the instant case did not warrant the learned trial judge to undertake a separate exercise to rule whether the appellant had rebutted s 37(da) and the 37(d) presumptions.

**[48]** As such this first part of the appeal is undoubtedly without any merit.

*That the learned trial judge misdirected himself when he criticised the appellant for remaining silent*

**[49]** This ground of appeal relates to the learned trial judge's criticism of the appellant for not disclosing the role of the lady 'Noi' in his cautioned statement.

**[50]** Learned counsel alleged that the criticism could be found at pp 87 and 88 of the appeal record. The learned trial judge had said:

> 'Noi' was critical to the defence. Reasonably, it must have dawned upon the accused that in order to extricate himself he must disclose 'Noi' and her alleged role, that is, if he had nothing criminally to do with the white plastic bag. The accused contended that he informed PW5 that Noi had deposited the bag and that 'Noi' was inside Hotel Desa Jaya. PW5 denied that he was so informed. But if the accused had indeed informed PW5 about 'Noi' and her alleged role, then why was it that the accused elected not to disclose 'Noi' and or her alleged role when he had the opportunity to do so on 6 May 2002, when events were still fresh, in his statement (see D17)? It just did not add up that the accused would choose not to disclose 'Noi' and or her alleged role in his statement, if there was any truth about the role of 'Noi'. Moreover, the conduct of the accused was not consistent with the alleged fact that it was 'Noi'. Reasonably, the alleged presence of 'Noi' just before the raid was not plausible and therefore could not be accepted.

**[51]** Learned counsel submitted that it is trite law that an accused person charged under the Dangerous Drugs Act 1952 can elect to remain silent in his cautioned statement and quoted the cases of *Teng Boon How v Pendakwa Raya* [1993] 3 MLJ 553 (SC), *Alcontara a/l Ambross Anthony v Public Prosecutot* [1996] 1 MLJ 209; [1996] 1 CLJ 705 and *Mohd Hazrin bin Md Sari v Public Prosecutor* [2008] 3 MLJ 798; [2008] 5 CLJ 361 (CA).

A **[52]** We appreciate that no adverse inference may be drawn against the appellant for remaining silent upon his arrest. The appellant does not have any duty to disclose his defence and entitled to remain silent after his arrest and when his cautioned statement was recorded. Similarly no adverse inference is to be drawn against the appellant for remaining silent for not disclosing his B defence. However, his silence would entitle the learned trial judge to give whatever weight considered appropriate.

**[53]** Lim Beng Choon J in *Public Prosecutor v Badrulsham Baharom* [1988] 2 MLJ 585 at p 590 said:

C

> ... it is legitimate for the court to scrutinize the evidence as to what the accused said contemporaneously with the act or omission and also the surrounding circumstances under which the accused acted or failed to act. Such evidence is of course not conclusive by itself; it may be overborne by stronger evidence the other way. Nevertheless, it is not wrong to say the accused's state of mind may be gathered D from the evidence of what he did or failed to do or what he said on the occasion in question. Putting it shortly, one may say that in order to arrive at a finding of knowledge the court will have to consider the totality of the evidence including any explanations and denials made by the accused and his conduct on the occasion in question.

E

**[54]** By commenting on the failure of the appellant to provide all relevant information regarding 'Noi' to the police at the time of his arrest or when his cautioned statement was recorded four days after his arrest does not mean that the learned trial judge had imposed a duty on the appellant to speak or disclose F any information on 'Noi'. We do not perceive from the grounds of judgment of the learned trial judge that he had drawn any adverse inference against the appellant. To us his comments on the non disclosure of 'Noi's' role merely go to show to the weight that was attached to the appellant's defence (see: *Teng Howe Sing v Public Prosecutor* [2009] 3 MLJ 46 ; [2009] 3 CLJ 733).

G

**[55]** Zulkefli Makinudin FCJ (as he then was) said at p 63 (MLJ); p 750 (CLJ) of *Teng Howe Sing*'s case:

> Applying the principle in *Badrulsham*'s case to the facts of the instant case, the learned trial judge was correct to conclude that the appellant had two opportunities H to provide information about 'Ho Seng', ie, at the time of his arrest and five days later during recording of his cautioned statement but he failed to do so. We are therefore of the view that in the circumstances, the appellant's failure to provide relevant information about 'Ho Seng' for the police to carry out a thorough investigation into the probability of his defence, entitled the learned trial judge to I disbelieve him.

**[56]** Similarly in the instant case, the failure of the appellant to inform the police through his cautioned statement could be taken into account by the learned trial judge in attaching weight to his defence. Obviously 'Noi' is a

nickname and without giving any particulars of 'Noi', it would be impossible for the police to conduct any investigation on her whereabout and indeed her very existence and to her role, if any, in relation to the drugs found on the lap of the appellant. Hence, the learned trial judge was entitled to disbelieve the defence story.

**[57]** The learned trial judge had in fact further deliberated on the story of the defence when he said at p 88 of the appeal record:

> There was one other aspect of the defence that did not sit well with the assertion of ignorance. The accused testified that PW5 found the white plastic bag in the foot well, that PW5 did not open the white plastic bag, and that it was at that point that he informed PW5 that the white plastic bag belonged to 'Noi' (see 47NP). But if PW5 had not opened that bag, and if the accused did not know that it contained drugs, then what reason was there for the accused to distance himself from the white plastic bag when its contents were yet unbeknown to him?

**[58]** Edgar Joseph Jr J had occasion to consider this point in the High Court case of *Public Prosecutor v Tan Gong Wai & Anor* [1985] 1 MLJ 355. He said at p 361:

> I realise that no adverse inference against an accused person may be drawn by reason of his failure to call any witness or indeed to even give evidence on his own behalf for all he has to do is to raise a reasonable doubt: (*Goh Ah Yew v Public Prosecutor*). However, the failure to call any particular witness is a matter which the Court may take into account in assessing the weight of evidence (without drawing any adverse inference) especially so when the potential witnesses were persons in respect of whom the prosecution had probably no means of knowing that they might have any relevant evidence to give until the accused himself came to give evidence (*Regina v Gallagher*; *Public Prosecutor v Lim Kuan Hock*; *Tay Choo Wah v Public Prosecutor*).

**[59]** On this issue, we agree with the Court of Appeal when it held at p 10 of the supplementary appeal record as follows:

> It is our judgment that the trial Judge's comment on the appellant's failure to disclose the role of 'Noi' in the cautioned statement was a legitimate exercise in evaluating the veracity of the appellant's story and it merely goes to the weight of the appellant's defence. This exercise of evaluation is permissible under the law.

**[60]** Consequently, the second ground of appeal is also clearly without any merit.

**[61]** After a careful and a robust scrutiny we are left with no doubt that the appellant has failed to raise a reasonable doubt of the prosecution's case. For the reasons stated above, we affirm the decision and sentence of the learned High Court judge which was affirmed by the Court of Appeal. Appeal is dismissed.

*Appeal dismissed; decision and sentence affirmed.*

Reported by Dzulqarnain Ab Fatar